Supreme Court, U.S.
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In The

Supreme Court of the United States

JACK C. CHILINGIRIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S COMPLAINT FOR NEGLIGENCE AND NEGLIGENT SUPERVISION OF FEDERAL PROSECUTORS WAS COGNIZABLE UNDER THE FEDERAL TORT CLAIMS ACT?

II. WHETHER THE FAILURE TO FOLLOW THE POLICIES RECITED IN THE DEPARTMENT OF JUSTICE ATTORNEY'S MANUAL CONSTITUTED ACTIONABLE NEGLIGENCE SUFFICIENT TO PERMIT THE FILING OF A COGNIZABLE CLAIM UNDER THE FEDERAL TORT CLAIMS ACT?

III. WHETHER THE ACTIONS AND CONDUCT OF THE PROSECUTORS IN THE INSTANT CASE WERE OF AN INVESTIGATORY NATURE AND THEREFORE NOT EXEMPT UNDER 28 U.S.C §2680(h) OF THE FEDERAL TORT CLAIMS ACT?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JACK C. CHILINGIRIAN, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Court of Appeals for the First Circuit rendered on July 30, 2004.

OPINION BELOW

The Opinion and Judgment of the First Circuit Court of Appeals is unpublished. The Opinion and Judgment is reproduced at Appx 1a-3a.

STATEMENT OF JURISDICTION

The Judgment of the District Court was entered on January 27, 2004, pursuant to a Memorandum of Decision dated January 23, 2004 rendered by the Hon. Rya W. Zabel, United States District Judge for the District of Massachusetts. That Memorandum of Decision is reproduced at Appx 4a-8a.

Petitioner timely filed his Notice of Appeal with the First Circuit Court of Appeals on February 13, 2004.

The First Circuit Court of Appeals issued its unpublished Opinion and Judgment on July 30, 2004.

On October 15, 2004, the Hon. David H. Souter, Associate Justice and Circuit Justice for the First Circuit granted Petitioner's Application for Extension of Time to File this Petition for Writ of Certiorari through and including December 27, 2004.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty or property without due process of law."

28 U.S.C. §1346(b) states as follows:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have the exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting with the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(h) of the Federal Tort Claims Act states as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the

United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, batter, false imprisonment, false arrest, abuse of process, or malicious prosecution: For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT OF THE CASE

1. The Underlying Facts.

Petitioner, a former attorney was charged in a 33 Count Indictment in the United States District Court for the Eastern District of Michigan. After a Bench Trial, he was acquitted of all counts of the indictment except for one count of Conspiracy to Launder Money Instruments in violation of 18 U.S.C. §1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h).

He was sentenced to 37 months in custody. On direct appeal the Sixth Circuit Court of Appeals affirmed Petitioner's conviction, but reversed and remanded for resentencing. *United States v. Chilingirian,* 280 F.3d 704 (6th Cir. 2002).

At his re-sentencing Petitioner challenged not only his conviction, but any sentence greater than 12 months relying upon this Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). The District Court resentenced the Petitioner to 87 months incarceration, increasing the original sentence by 50 months.

On May 30, 2002, the Petitioner filed his second direct appeal with the Sixth Circuit Court of Appeals.

On June 12, 2002, Petitioner provided the requisite Notice and Statement of Claim for Damages pursuant to 28 U.S.C. §2675 of the Federal Tort Claims Act ("FTCA").

In that Notice and Statement of Claim, Petitioner asserted negligence and negligent supervision of Federal Prosecutors in the Eastern District of Michigan as the grounds for his "FTCA" claims. These acts of negligence related to events that took place prior to the obtaining of the indictment and ultimate prosecution which resulted in Petitioner's conviction and incarceration.

Petitioner alleged unlawful and negligent conduct by the prosecutors in failing to comply with regulations and policies designed to guide the actions of U.S. Attorney's in obtaining indictment authority in connection with the bringing of criminal charges relating to money laundering.

Further, that the U.S. Attorney's during the initial period prior to obtaining the indictment against the Petitioner, and acting in their investigative capacity attempted to extort and intimidate the Petitioner into violating the attorney-client privilege by seeking his cooperation by providing testimony against Petitioner's clients in exchange for the grant of immunity from prosecution.

On October 22, 2002, the Department of Justice denied Petitioner's timely claim for damages under the "FTCA."

2. The District Court Proceedings in the Instant Case.

On April 9, 2003, the Petitioner commenced a timely action under the "FTCA" 28 U.S.C. §2671, et seq., by filing

his Complaint in the United States District Court for the District of Massachusetts. (Appx 9a-20a).

On June 12, 2003, the Respondent filed a Motion to Dismiss the Complaint pursuant to FRCP 12(b)(6), asserting inter alia that (1) Petitioner's claims should be dismissed as a matter of law; (2) the "FTCA" claims were expressly prohibited by Statute; (3) absent reversal of Petitioner's conviction in the underlying criminal case pursuant to the "favorable termination" rule announced by this Court in *Heck v. Humphrey,* 512 U.S. 477 (1994) there could be no recovery under any theory; and (4) Federal Prosecutors were entitled to absolute immunity from suit.

On July 17, 2004, the Petitioner filed his Answer and Memorandum in opposition to the above denoted Motion to Dismiss. The grounds for this opposition were premised on the fact that his conviction and sentence were not final and that an appeal was pending before the Sixth Circuit Court of Appeals. In addition, the application of *Heck* was not based solely on reversal of Petitioner's conviction, **but** that his claims under the "FTCA" could proceed *if* the sentence was in fact reduced.[1]

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[1] Petitioner pointed out that in his second direct appeal he was challenging the sentence imposed on the basis of this Court's decisions in *Apprendi* and *Ring v. Arizona,* 536 U.S. 584 (2002) which required that *all facts* increasing the maximum sentence to which a Defendant could be subjected to, had to be charged in the indictment and proven at trial beyond a reasonable doubt. Petitioner also contended that this authority applied to the sentencing guideline maximum citing to this Court's decision in *United States v. R.L.C.,* 503 U.S. 291 (1992). Petitioner asserted that he should not be in prison, that the Prosecutors were well aware of this authority and that they had acted negligently throughout the proceedings in the criminal case.

Finally, the Petitioner argued that federal prosecutors were not absolutely immune under the facts as alleged in the Complaint, and that the Government's position was an improper recitation of the legal authority since the claims under the "FTCA" were based on negligence and therefore the issue of immunity would not apply.

On January 23, 2004, the Hon. Rya W. Zobel, United States District Judge for the District of Massachusetts issued a Memorandum of Decision granting Respondents Motion to Dismiss. The Memorandum of Decision relied upon this Court's ruling in *Heck v. Humphrey* as the basis for dismissing Petitioner's Complaint. (Appx 6a)

The District Judge in analogizing Petitioner's claims to those raised under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) indicated that under *Heck,* "in order to recover damages for allegedly unconstitutional conviction or imprisonment, . . . a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order . . . or called into question by a federal courts issuance of a writ of habeas corpus." 512 U.S. at p. 486-87.

The District Court also rejected Petitioner's argument that *Heck* did not apply to inmates who could seek habeas relief since Petitioner had the opportunity to raise such a challenge to his prosecution and confinement and sentence in a habeas petition and that in the instant case the Petitioner had failed to file such a Petition. (Appx 7a).[2]

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[2] This gratuitous statement by the District Court Judge was in fact an inaccurate statement of the law as well as a misstatement of the events that had taken place. Petitioner had in fact filed a habeas petition relative to his prosecution, confinement and sentence in the

(Continued on following page)

On January 27, 2004, a Judgment in accordance with the Memorandum of Decision of January 23, 2004 was entered dismissing Petitioner's "FTCA" Complaint. (Appx 8a).

On February 13, 2004, Petitioner timely filed his Notice of Appeal with the First Circuit Court of Appeals.

3. Proceedings in the First Circuit Court of Appeals.

On Appeal Petitioner argued that the District Court had incorrectly applied the favorable termination rule as articulated in *Heck*. Further, that the District Court had erred in granting the Respondent's Motion to Dismiss pursuant to FRCP 12(b)(6) since the Complaint had alleged sufficient facts of negligence and negligent supervision under the "FTCA" to allow the Petitioner to proceed with his cause of action. Finally, that prosecutors were not absolutely immune under the facts as alleged.

The Government filed a Motion to Dismiss the Appeal and for Summary Disposition pursuant to First Circuit Rule 27(c). The Respondent again reiterated its contention

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Western District of Pennsylvania in File No. 00-227-ERIE. This request for habeas relief was filed pursuant to 28 U.S.C. §2241. The denial for such relief was appealed to the Third Circuit Court of Appeals which affirmed. *Chilingirian v. Ellis*, 263 F.3d 157 (3rd Cir. 2001). Petitioner further appealed to this Court by the filing of a Petition for Writ of Certiorari in docket No. 01-720. (September 13, 2001). The question presented in that case was stated as follows:

> "Can a Federal Prisoner who asserts that the Judgment of Conviction is being executed in violation of the Constitution, resort to habeas relief under 28 U.S.C. §2241 *prior* to a determination of his direct appeal and *prior* to the filing of a §2255 Motion? (emphasis added).

Review was denied by this Court on January 7, 2002. *Chilingirian v. Ellis*, 534 U.S. 1083 (2002).

that *Heck's* favorable termination requirement precluded the filing of Petitioner's cause of action. Further, that Petitioner's "FTCA" claims were expressly prohibited by statute relying upon 28 U.S.C. §2680(h).

In addition, relying upon two district court citations, the Respondent posited that "the conduct of federal prosecutors" could not form the basis of claims against the United States, and that "prosecutors" were not investigative or law enforcement officers as defined under §2680(h).

The Petitioner submitted an Answer to the Motion for Summary Disposition asserting that the *Heck* rule was not applicable to "FTCA" claims where negligence and negligent supervision was alleged. He further directed the First Circuit to specific acts of negligence (Appx 15a ¶36 16a-17a ¶¶42-44), as well as acts of negligent supervision (Appx 17a ¶¶47(a)-47(f)) to buttress his contention that a valid "FTCA" claim had been filed.

4. The First Circuit Court of Appeal's Opinion and Judgment.

On July 30, 2004, the First Circuit Court of Appeals rendered its unpublished Opinion and Judgment. (Appx 1a-3a). The First Circuit did not base its decision to affirm the District Court's Order of Dismissal on the *Heck* favorable termination rule. Rather, the first Circuit relied on this Court's decision in *FDIC v. Meyer,* 510 U.S. 471 (1994) where it had been held that constitutional tort claims were not cognizable under 28 U.S.C. §1346(b). In addition, the First Circuit held that "prosecutors . . . are not ordinarily 'investigative or law enforcement officers' within the meaning of §2680(h).

Relying upon two circuit court of appeals decisions they affirmed this principle. (Appx 2a). Finally, the First Circuit rejected Petitioner's claims of negligence and negligent supervision premised on the failure of federal prosecutors in following the Department of Justice Manual as grounds for the bringing of a valid FTCA claim. They rejected this argument on the basis of this Court's decision in *Schweiker v. Hansen*, 450 U.S. 785 (1984).

5. Further Proceedings in the Underlying Criminal Case.

On April 9, 2004, the Sixth Circuit decided *United States v. Chilingirian,* 2004 WL 771175 (6th Cir. April 9, 2004), and again reversed the district court's sentencing order and remanded the case back to the district court for the limited purpose of recalculating the Petitioner's sentence under the 2001 version of the sentencing guidelines.

Although, the Sixth Circuit acknowledged the Petitioner's argument that the "operation of the offense defining statute in conjunction with §2S1.1 of the Federal sentencing Guidelines would result in a relevant maximum sentence of 12 months," it rejected Petitioner's contention that his 87 month sentence violated the teachings of *Apprendi* and *Ring*.

Essentially, the Sixth Circuit rejected Petitioner's argument that a defendant's money laundering amount enhancement had to be submitted to the trier of fact at trial beyond a reasonable doubt.

On June 24, 2004, this Court decided *Blakely v. Washington*, 542 U.S. ___, 159 L.Ed.2d 403 (2004).[3]

On September 6, 2004, the Petitioner, after obtaining an Extension of Time, filed a Petition for Writ of Certiorari with this Court seeking review of his Judgment of Conviction.[4]

Petitioner's Judgment of Conviction and sentence are not final and are subject to review by this Court as well as the Sixth Circuit Court of Appeals.[5]

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[3] As part of his Appellate Brief and supplemental submission, the Petitioner had filed with the Sixth Circuit notice of this Court's grant of certiorari in *Blakely v. Washington,* 540 U.S. 965 (2003) as grounds for reversing the district court's imposition of the 87 month sentence based on the failure to follow this Court's teachings in *Apprendi* and *Ring.* Prior to oral argument in January of 2004, the Petitioner in a FRAP 28(j) filing suggested to the Sixth Circuit panel that would hear oral argument that this Court's ultimate decision could have a significant impact upon the decision which was rendered on April 9, 2004, supra. The Sixth Circuit did not consider this submission in the disposition of Petitioner's second direct appeal in *United States v. Chilingirian,* 2004 WL 771175 (6th Cir. April 9, 2004).

[4] The Petition for Writ of Certiorari to the Sixth Circuit was timely filed but was returned by the Clerk of this Court for refiling in conformity with Rule 33 of the Supreme Court Rules. This filing took place on November 10, 2004 in Docket No. 04-676. For purposes of the instant Petition, the only impact of that case would be premised upon whether a challenge to the Judgment of Conviction would be successful.

[5] The hearing on the Sixth Circuit remand in the criminal proceedings took place on October 26, 2004. The District Court Judge affirmed the 87 month sentence that was imposed on May 23, 2002. The District Court rejected all of the arguments presented relying upon the application of *Blakely,* rejected any consideration of announcing an alternative sentence as suggested by the Sixth Circuit in *United States v. Sandridge,* U.S. App. Lexis 20538 *18 (6th Cir. September 30, 2004) and denied bail on the basis that Petitioner had failed to raise a "substantial" question under the Bail Reform Act. Petitioner filed his **THIRD** Notice of Appeal on November 2, 2004 in Sixth Circuit Docket No. 04-2373. That appeal remains pending.

REASONS FOR GRANTING THE WRIT

This Court resolved the issue of jurisdiction to determine the validity of claims brought under the FTCA in *United States v. Smith,* 499 U.S. 160 (1991). This Court in *Smith* held that where the action is properly brought against the United States, "the FTCA is the exclusive mode of recovery for the tort of a Government employee *even when the FTCA precludes government liability.*" 499 U.S. at p. 165-66 (emphasis added).

The First Circuit Court of Appeals' reliance upon *Franco De Jerez v. Burgos,* 947 F.2d 527 (1st Cir. 1991) was misplaced.[6] The Court in *Burgos,* in affirming the dismissal of the Complaint by the district court did so on the basis that the Complaint had been "restricted to a constitutional claim" in a pre-trial stipulation. 947 F.2d at p. 529. Therefore, the First Circuit held that there could be no FTCA remedy. Presumably, if "negligence" or "negligent supervision" had been pled as the Petitioner did in the instant case[7] the fatal defect in the cause of action would not have brought it within the ambit of the authority relied upon for dismissal. Further, that pursuant to 28 U.S.C. §1346(b) liability would have been premised upon liability being based on the law of the state where the federal employees actions had taken place and also would have not come within the exception recited in 28 U.S.C. §2680(h).

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[6] The First Circuit in *Burgos,* did not address the impact of this Court's decision in *United States v. Smith* which had been decided six months earlier.

[7] See Appx 13a ¶¶22, 23 & 25; Appx 15a ¶36; Appx 16a ¶¶42-44; Appx 17a-18a ¶47(a)-(f); Appx 19a ¶49.

However, since Petitioner's legal and factual claims were required to be read in the light most favorable to him and the Complaint allegations taken as true, *Estelle v. Gamble,* 429 U.S. 97 (1976), dismissal was not consistent with the allegations averred in the underlying FTCA Complaint. *Hishon v. King & Spaulding,* 469 U.S. 69, 73 (1984).

This Court has held that the Government could be sued for the failure to follow its own regulations. *Service v. Dulles,* 354 U.S. 363 (1957). Further, this Court has established pursuant to the teachings announced in *United States ex rel. Accardi v. Shaugnessy,* 347 U.S. 260 (1954) a judicially-evolved doctrine ensuring fairness in [legal] proceedings which require that the rules promulgated by a federal agency which regulates the rights and interests of others, are controlling upon the agency. *Columbia Broadcasting Systems Inc. v. United States,* 316 U.S. 407, 422 (1942).

The First Circuit Court of Appeals reliance upon *Schweiker v. Hansen,* 450 U.S. 785 (1981) as authority for summary affirmance of the dismissal of Petitioner's FTCA claims based upon the rationale that the Department of Justice Attorney Manual, not conferring any rights to the Petitioner, overlooked the above recited precedent.

Finally, the First Circuit's determination that the prosecutors were not acting in an investigative or law enforcement capacity, was contrary to the facts alleged in the Complaint and should have precluded dismissal under FRCP 12(b)(6). Thus, reliance upon the exception recited in 28 U.S.C. §2680(h) was not well founded.

In addition, the lower court decision overlooked this Court's holding in *Imbler v. Pachtman,* 424 U.S. 409 (1976)

which left open the question as to whether prosecutors would be liable for actions taken during the administrative or investigative stages rather than during the advocatory process of a criminal proceeding. 424 U.S. at p. 430-31.

This Court should grant the Petition for Writ of Certiorari to resolve the important legal issues presented.

I. The Complaint Filed in the Instant Case Alleging Negligence and Negligent Supervision Were Cognizable Under the FTCA.

Under the FTCA, the United States has waived its sovereign immunity for negligence of their employees acting within the scope of their employment. This Court has repeatedly rejected a policy of strict construction for the FTCA and has held that it should be construed generously so as to accomplish Congress's purpose and policy in waiving archaic immunity, giving due regard to the statutory exceptions to that policy. *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *Rayonier Inc. v. United States,* 352 U.S. 315, 320 fn. 3 (1957); *United States v. Yellow Cab Co.,* 340 U.S. 543, 555 (1951).

The FTCA exempts intentional torts from its sovereign immunity waiver but expressly allows claims of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution," arising out of "acts or omissions of investigative or law enforcement officers of the United States." 28 U.S.C. §2680(h).

In his Complaint, Petitioner had alleged negligence by the prosecutors who brought the underlying criminal indictment against him at a time when they were acting in an investigative capacity, not in an advocatory capacity

(Appx 12a-13a ¶¶19, 24 & 25; Appx 15a ¶36; Appx 16a ¶42). In addition, he asserted negligent supervision of those prosecutors who obtained an infirm indictment without obtaining the requisite authority under the rules of the Department of Justice (Appx 13a ¶23; Appx 14a ¶31; Appx 16a-17a ¶¶42-43; Appx 17a 47(a) & 47(e)).

Specifically what was at issue in the instant case with reference to the allegations in the Complaint filed by the Petitioner was whether the exception in §2680(h) should bar a claim based on the "negligence," not only of the individual prosecutors who brought the underlying criminal prosecution against him but also those who continued the action in light of their failure to obtain appropriate authority as required by their own policy statements, as well as those government employees who were acting in a supervisory capacity over those individuals. These allegations also would have applied to the failure of these government employees to comply with Supreme Court authority which was not followed and which resulted in damage to the Petitioner.

Several Circuit Courts of Appeal have held that this type of "negligent supervision" precludes the application of the exceptions recited in §2680(h). See *Morrill v. United States,* 821 F.2d 1426, 1427 (9th Cir. 1987); *Panella v. United States,* 216 F.2d 622 (2d Cir. 1954).[8] In other words, where the Government's own negligence is at issue and is

[8] The Circuit split on this issue is best expressed by the decisions in *Hoot v. United States,* 790 F.2d 836 (10th Cir. 1986) following *Wine v. United States,* 705 F.2d 366 (10th Cir. 1983) and *Thigpen v. United States,* 800 F.2d 393, 396 (4th Cir. 1986) where the allegations of negligent supervision did not suffice to circumvent the statutory mandate expressed in §2680(h).

the proximate cause of the injuries suffered, the exceptions in §2680(h) do not insulate the Government from liability. See *Bennett v. United States,* 803 F.2d 1502, 1503 (9th Cir. 1986). Also, *Kearney v. United States,* 815 F.2d 535, 537 (9th Cir. 1987).

The Petitioner suggests that this case is an excellent vehicle for this Court to resolve the conflict amongst the Circuits relative to the issue of whether the allegations of "negligent supervision" brought in a Complaint under the FTCA precludes the application of 28 U.S.C. §2680(h) to bar or authorize dismissal of such a Complaint.

II. The Failure of the Prosecutors to Follow the Policies Recited in the Department of Justice Attorney's Manual Constituted Actionable Negligence Sufficient to Permit the Filing of a Cognizable Claim Under the FTCA.

The Petitioner's Complaint (Appx 13a ¶23; Appx 15a ¶36; 17a-18a ¶47c & 47d) alleged the failure to follow the regulations and policies recited in the Department of Justice Attorney's Manual in connection with the obtaining of a criminal indictment against attorneys.

The First Circuit's reliance upon. *Schweiker v. Hansen,* 450 U.S. 785 (1981) was premised on the concept that an Agency's Manual (in *Schweiker* the Social Security Administration Manual) was not to be construed as a regulation, and therefore, not binding upon that agency. The First Circuit's interpretation of the 13 volume handbook used by the Social Security Administration was that it was for internal use and that any breach of the duties and obligations in that Manual would not support a claim against the Government. 450 U.S. at p. 789.

The Petitioner alleged that the prosecutors who brought the indictment against him failed to follow established policy contained in the Attorney's Manual and that they acted in contravention of his rights and that their continued actions constituted a basis upon which Petitioner was entitled to bring a viable claim under the FTCA.[9]

In a long line of cases beginning with *Bridges v. Wixon,* 326 U.S. 135 (1945) this Court has held that "one under investigation . . . is legally entitled to insist upon the observance of rules" promulgated and adopted by an executive or legislative body for his or her protection. See *United States v. Nixon,* 418 U.S. 683, 695-96 (1974); *Morton v. Ruiz,* 415 U.S. 199, 235 (1974); *Yellin v. United States,* 374 U.S. 109, 115 (1963); *Vitarelli v. Seaton,* 359 U.S. 535, 546 (1959); *Service v. Dulles,* 354 U.S. 363, 372 (1957); *United States ex rel Accardi v. Shaughnessy,* 347 U.S. 260, 267-78 (1954).

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[9] The requirement to obtain authority for the bringing of an indictment for Money Laundering against the Petitioner (a former attorney) was clearly documented in the United States Department of Justice Criminal Resource Manual Title 9-105.300(3); 9-105.310; and 9-105.330(4). All of these provisions implicated the requirement that the filing of an indictment against an attorney and one which involved "receipt and deposit" of allegedly criminally derived funds mandated notice to the Asset Forfeiture and Money Laundering Section of the Department of Justice *and* the written approval for the filing of an indictment. In addition, the Department of Justice Criminal Division in a August 1993 **BLUESHEET** directed all U.S. Attorney's who were holders of the Manual Title 9 described above to obtain the prior approval from the AFMLS before prosecuting any attorney under 18 U.S.C. §1956 and 18 U.S.C. §1957. Further, the above noted **BLUESHEET** mandated that U.S. Attorney's were required to notify the AFMLS thru the submission of a Prosecutive Memorandum of any such indictment against an attorney. This was not done in connection with the Petitioner's underlying criminal case.

Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. *Morton v. Ruiz,* 415 U.S. at p. 235, citing *Service v. Dulles* and *Vitarelli v. Seaton.*

The challenge in the instant case involves the inquiry and resolution of the question of whether the Petitioner would have been indicted if the U.S. Attorney's Office in the Eastern District of Michigan had followed the policy described above. The question can only be answered in favor of the Petitioner if it is acknowledged that an "executive agency must be rigorously held to the standards by which it professes its actions to be judged." See *SEC v. Chenery Corp.,* 318 U.S. 80, 87-88 (1943).

If a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, even when that regulation requires more than it would under the specific provision of the Constitution or statute, then the source of that right should permit an action being brought to uphold a violation of such rule, regulation or policy. *Morton v. Ruiz,* 415 U.S. at p. 235.

A court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law. In *Bridges v. Wixon,* 326 U.S. 135 (1945) this Court held invalid a deportation order on the basis of statements which did not comply with the Immigration Services's Rules requiring signatures and oaths, finding that the rules were designed "to afford [the

alien] due process of law" by providing "safeguards against essentially unfair procedures." 326 U.S. at p. 152-153.[10]

At least one Circuit Court of Appeals has indicated that governmental agencies must follow their own manuals as a matter of law. *Duncan Energy Co. v. U.S. Forest Service,* 50 F.3d 584, 590 (8th Cir. 1995) citing *Morton v. Ruiz.*

To the extent that this Court has held that due process requires an agency to be bound by its own manuals or regulations the Petitioner has established sufficient facts upon which an action under the FTCA may be brought.

The First Circuit below failed to consider authority from this Court relative to this issue thereby creating a conflict which should be resolved.

This case is an excellent vehicle to reaffirm the significant authority supporting Petitioner's argument that manuals or regulations are binding on an agency when they affect individual rights, and that an agency must follow its own rules as a matter of law.

III. The Actions and Conduct of the Prosecutors in the Instant Case Were of an Investigatory Nature and Therefore Not Exempt Under 28 U.S.C. §2680(h).

The Petitioner's FTCA Complaint alleged that the prosecutors in the instant case were acting in their administrative or investigatory capacity thereby precluding

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[10] See also *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 155 (1923) where this Court assumed that "one under investigation with a view to deportation is legally entitled to insist upon observance of rules promulgated by the Secretary pursuant to law."

application of 28 U.S.C. §2680(h) to bar his Complaint. (Appx 12a ¶¶17-18; Appx 18a ¶¶47e & 47f).

The First Circuit decision concluded that prosecutors "are not ordinarily 'investigative or law enforcement officers' within the meaning of 28 U.S.C. §2680(h).

State and Federal executive branch officials charged with constitutional or statutory violations are entitled to qualified immunity under certain limited circumstances. *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982); *Butz v. Economou,* 438 U.S. 478, 508 (1978).

This Court has recognized that there are some "special functions" which deserve the cloak of absolute immunity from damage claims.[11] Prosecutors fall into this category. The justification for according absolute immunity to prosecutors is premised on the concept of protecting the judicial process. *Burns v. Reed,* 500 U.S. 478, 484 (1991); *Imbler v. Pachtman,* 424 U.S. 409, 422-23 (1976).

Specifically, absolute immunity for prosecutors is warranted; (1) to allow prosecutors to focus their energies on prosecuting, rather than defending lawsuits; *Burns,* 500 U.S. at p. 485; *Imbler,* 424 U.S. at p. 423-24; (2) to enable prosecutors to exercise independent judgment in deciding which suits to bring and conducting them in court, *Burns*, 500 U.S. at p. 485; *Imbler*, 424 U.S. at p. 423-24; (3) to preserve the criminal justice system's function of determining guilt or innocence by ensuring that triers of fact are not denied relevant (although sometimes

[11] Among the positions which have been accorded absolute immunity are the President; *Nixon v. Fitzgerald,* 457 U.S. 731 (1982); Legislators; *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975); judges; *Stamp v. Sparkman,* 435 U.S. 349 (1978).

conflicting) evidence because of prosecutors' fear of suit, *Imbler* 424 U.S. at p. 427; and (4) to ensure fairness to defendants by enabling judges to make rulings in their favor without the subconscious knowledge that such rulings could subject the prosecutor to liability. *Imbler,* 424 U.S. at p. 427.

This Court in *Imbler,* left open the question whether "immunity" would apply for those aspects of the prosecutors responsibility for actions taken in the role of administrator or investigative officer as opposed to those made as an advocate. *Imbler,* 424 U.S. at p. 430-31.

The First Circuit decision in the instant case was an effort to characterize the prosecutors actions as advocatory during judicial process as opposed to actions taken during the investigatory stage of the proceedings. Many of the allegations made by the Petitioner in his FTCA complaint related to actions taken *prior* to the commencement of any Grand Jury or Judicial proceedings. (Appx 12a ¶¶6-20). Thus, as has been held by this Court "the actions of a prosecutor are not absolutely immune merely because they are performed by the prosecutor." *Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993).

The First Circuit's analysis resulted in the prosecutors actions being placed outside of any liability based on the general nature of the functions normally performed by a prosecutor. This Court has delineated a prosecutor's liability based on "the nature of the functions performed, not the identity of the actor who performed it." *Kalina v. Fletcher,* 522 U.S. 118, 127 (1997) quoting *Forrester v. White,* 484 U.S. 219, 229 (1988). This Court further elaborated on the distinction in functions where it stated:

> "Almost any action by a prosecutor, including his or her direct participation in purely investigative

> activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have *never* indicated that absolute immunity is *expansive*, rather, as in *Imbler,* we inquire whether the prosecutor's actions are *closely associated with the judicial process.*" *Burns*, 500 U.S. at p. 495-96. (Emphasis added in bold but no underlining).

The demarcation of these types of functions implicates the concept that prosecutors do act in an investigative or law enforcement capacity as alleged by the Petitioner. By rejecting absolute immunity for actions taken by prosecutors who were performing essentially investigative functions this Court has reasoned that:

> "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detectives role in searching for clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Buckley v. Fitzsimmons,* 509 U.S. at p. 273.

The First Circuit's opinion suggested that §2680(h) applies to bar claims under the FTCA because prosecutors are not considered "investigatory or law enforcement officers." As evidenced by the above recited authority, it is clear that such a distinction in prosecutorial functions does exist in the context of immunity from suit, and should therefore, also apply to actions brought under the FTCA. This Court's holding in *Imbler* was to the effect that

immunity does not extend to the investigative or preliminary phase of a prosecution. In Justice Powell's opinion in *Imbler* he indicated:

> "We recognize the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these two functions may present difficult questions, but this case does not require us to anticipate them." 424 U.S. at p. 431 fn. 33.

This Court has left the line to be drawn on a case by case basis, dependent upon the facts alleged with respect to the prosecutors actions.

The instant case is one of first impression relative to the cognizability of a claim under the FTCA involving the actions of prosecutors who are alleged to have acted negligently and supervised negligently in the scope of their employment as investigatory or law enforcement officers.

Petitioner's factual claims as addressed above should have not been dismissed pursuant to FRCP 12(b)(6). The Government's cavalier attitude relative to the allegations of wrongdoing by prosecutors reflects what has become the norm in the federal system. It is contrary to the admonition from this Court which has held that prosecutors should submit fair and just blows against criminal defendants they prosecute, not foul ones that were alleged in the Complaint filed in the instant case.

This case is an appropriate vehicle for this Court to answer the question left open in *Imbler* with respect to prosecutors being immune from suit in their administrative or investigatory roles and for clarification of the standards determining whether prosecutors can act in those capacities and be held liable under the FTCA pursuant to 28 U.S.C. §2680(h).

CONCLUSION

For the above recited reasons and based on the authority presented the Petition for Writ of Certiorari should be granted.

DATED: DECEMBER 21, 2004

Respectfully submitted,

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Petitioner Pro Se
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Federal Medical Center Devens
P.O. Box 879
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United States Court of Appeals
For the First Circuit

No. 04-1250

JACK C. CHILINGIIRIAN,

Plaintiff, Appellant,

v.

UNITED STATES,

Defendant, Appellee.

Before

Selya, Lynch and Lipez,
Circuit Judges.

JUDGMENT

Entered: July 30, 2004

Plaintiff, Jack C. Chilingirian, appeals the district court's dismissal of his complaint. We now affirm.

Plaintiff, a former attorney, was indicted and subsequently convicted for conspiracy to launder money instruments in violation. of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) & 1956(h). Be brought this suit against the United States, alleging five causes of action under the FTCA, based upon the conduct of United States prosecutors in indicting and prosecuting him.

There is some authority from our sister circuits for applying the favorable termination requirement articulated in *Heck v. Humphrey,* 512 U.S. 477 (1994), to causes of action brought pursuant to the FTCA. *See Erlin v.*

United States, 364 F.3d 1127 (9th Cir. 2004); *Parris v. United States,* 45 F.3d 383 (10th Cir. 1995). However, we need not determine whether the First Circuit would take this approach. Instead, we can uphold the dismissal of the complaint squarely on other grounds. Counts One, Three and Four[1] of the complaint state constitutional claims, which are not cognizable under the FTCA. *See FDIC v. Meyer,* 510 U.S. 471, 477 (1994) ("[W]e conclude that [plaintiff's] constitutional tort claim is not cognizable under [28 U.S.C.] § 1346(b) because . . . § 1346 does not provide a cause of action for such a claim."); *Franco de Jerez v. Burgos,* 947 F.2d 527, 529 (1st Cir. 1991) ("Constitutional violations are not actionable under the FTCA."); *Castro v. United States,* 775 F.2d 399, 405 (1st Cir. 1985) (same). Counts Two and Five allege false arrest, abuse of process and malicious prosecution, which are explicitly exempted from the reach of the FTCA, except with respect to "investigatory or law enforcement officers." 28 U.S.C. § 2680(h); *Abreu-Guzman v. Ford,* 241 F.3d 69, 75 (1st Cir. 2001.

Plaintiff argues that United States prosecutors, in bringing his indictment, acted in an investigative – not a prosecutorial – capacity, and therefore, their actions do not

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[1] The complaint alleged the following causes of action:

Count I: Deprivation of right to due process and an impartial Grand Jury under the Fifth Amendment

Count II: False arrest, abuse of process and malicious prosecution under Michigan law

Count III: Deprivation of property without due process

Count IV: Violation of the Thirteenth Amendment

Count V: Malicious prosecution for acting on his right to appeal and rights under the United States Constitution

fall within the exclusion. Prosecutors, however, are not ordinarily "investigative or law enforcement officers" within the meaning of 28 U.S.C. § 2680(h). *Accord Moore v. United States,* 213 F.3d 705, 710 (D.C. Cir. 2000) ("[N]one of [the prosecutor] Valder's conduct can be the basis for a malicious prosecution claim against the government because he is not an investigative or law enforcement officer."); *Bernard v. United States,* 25 F.3d 98, 104 (2d Cir. 1994) ("The FTCA authorizes suits for abuse of process based only on the actions of federal investigative or law enforcement officers, not on the actions of government prosecutors.").

According to Plaintiff, the complaint states a claim for negligence and negligent supervision because United States prosecutors' failed to follow the Department of Justice Attorneys' Manual (the "Attorneys' Manual") in indicting and prosecuting him for money laundering. The guidelines in the Attorneys' Manual do not, however, confer any enforceable rights. Attorneys' Manual § 1-1.100 (explicitly stating that it may not be relied upon to create any rights). Rather, the Attorneys' Manual is a handbook for internal use, which has no binding legal force. *Cf. Schweiker v. Hansen,* 450 U.S. 785, 789 (1981) (holding that the Social Security Administration's Claims Manual is not a legally binding regulation); *Flechsig v. United States,* 991 F.2d 300, 303 (6th Cir. 1992) (holding that the Bureau of Prison's Program Statement is an internal operating procedure, the violation of which does not constitute negligence *per se*). It follows that Plaintiff's negligence claim may not arise from United States prosecutors' alleged failure to follow guidelines in the Attorneys' Manual and Plaintiff's complaint fails to state any cognizable claim under the FTCA.

Affirmed. See Local R. 27(c).

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk.

[cc: Messrs. Chilingirian and Sternberg]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-10703-RWZ

JACK C. CHILINGIRIAN

v.

UNITED STATES OF AMERICA

MEMORANDUM OF DECISION

January 23, 2004

ZOBEL, D.J.

Plaintiff Jack. C. Chilingirian, an inmate at the Federal Medical Center in Ayer, Massachusetts, was convicted in 1999 of money laundering conspiracy in the United States District Court for the Eastern District of Michigan. In April 2003, he filed this action *pro se* against defendant United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* Plaintiff seeks $20 million, alleging that the federal prosecutors responsible for his case "negligen[tly] and wrongful[ly]" deprived him of "his right to due process and to an informed and impartial Grand Jury," subjected him to false arrest and abuse of process and malicious prosecution, deprived him of property without due process of law, violated his Thirteenth Amendment rights, and wrongfully "punish[ed] the Plaintiff for his reliance upon the right to file an appeal of his criminal conviction and additional rights under the United States Constitution." Defendant has filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) & (6).

According to the Complaint, plaintiff was an attorney in the state of Michigan from 1971 until his post-conviction disbarment in 2000. His prosecution stemmed

from his representation of three brothers, Jack, Charles and George Rashid ("the Rashids"), who owned companies that sought to develop a "radar braking collision warning device." In the summer of 1996, the United States Attorney's Office for the Eastern District of Michigan issued an information accusing the Rashids of defrauding investors. In September 1996, the U.S. Attorney subpoenaed plaintiff, demanding records, files, papers and documents relating to his representation of the Rashids. His clients refused to waive attorney-client privilege. Plaintiff delivered the documents under seal to the district judge who authorized the subpoenas. Six months later, plaintiff received a target letter from the U.S. Attorney's Office and attended a meeting with several assistant U.S. attorneys ("AUSAs"). According to plaintiff, at that meeting an AUSA offered him immunity in exchange for violating the attorney-client privilege by turning over documents and testifying against his clients. Plaintiff refused to do so and was indicted in April 1997. Plaintiff alleges that the indictment[1] "failed to state a federal offense" and was obtained in violation of Department of Justice regulations. Moreover, plaintiff alleges that although his sentence runs afoul of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), federal prosecutors have not moved for "vacature of the constitutionally infirm Judgment of Conviction." Plaintiff's

[1] Plaintiff was indicted on charges of conspiracy in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, aiding and abetting the interstate transportation of funds taken by fraud in violation of 18 U.S.C. § 2314, witness tampering in violation of 18 U.S.C. § 1512, and conspiracy to launder monetary instruments in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h). *United States v. Chilingirian,* 280 F.3d 704, 708 (6th Cir. 2002).

conviction was affirmed on February 13, 2002. *United States v. Chilingirian,* 280 F.3d 704 (6th Cir. 2002).

Defendant makes three arguments in support of dismissal: (1) that plaintiff's Complaint alleges in essence false imprisonment, malicious prosecution and abuse of process and is therefore barred by the Federal Tort Claims Act's intentional torts exception, 28 U.S.C. § 2680(h); (2) that plaintiff cannot recover damages under any theory because the Sixth Circuit affirmed his conviction, *see Heck v. Humphrey,* 512 U.S. 477 (1994); and (3) that the federal prosecutors were entitled to absolute immunity from civil liability. In opposition, plaintiff argues first that his Complaint alleges negligent training and supervision, which in turn led to the intentional torts. Second, plaintiff contends that the validity of his conviction is immaterial to his negligence claims, and that *Heck v. Humphrey* does not apply to "current and former prisoners who cannot seek habeas relief." Finally, plaintiff argues that the federal prosecutors were only entitled to qualified immunity because they were functioning in an investigative, as opposed to prosecutorial, capacity.

The affirmance of plaintiff's conviction warrants dismissal of this case. To prove the intentional torts alleged in this case, plaintiff would have to show that the criminal proceedings were initiated against him without probable cause and were terminated in his favor. *See Correllas v. Viveiros,* 572 N.E.2d 7, 10 (Mass. 1991). In *Heck,* the Supreme Court held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, . . . or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at

486-87. Federal courts have readily followed *Heck* in cases raised under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). *See, e.g., Robinson v. Jones,* 142 F.3d 905, 906-07 (6th Cir. 1998); *Williams v. Hill,* 74 F.3d 1339, 1340-41 (D.C. Cir. 1996). To the extent that the Complaint alleges a federal tort claim of negligent supervision or a *Bivens* action,[2] plaintiff's injuries would stem from the malicious prosecution, false imprisonment, and abuse of process that supposedly ensued. Because his conviction is valid, however, the alleged negligent supervision did not lead to the commission of any torts, and plaintiff's claims of injury are not cognizable. Plaintiff's argument that *Heck* does not apply to inmates who cannot seek habeas relief ignores the fact that he could have raised the issues regarding his prosecution, confinement and sentence in a habeas petition but did not.[3]

Accordingly, the motion to dismiss is allowed. Judgment may be entered dismissing the complaint.

January 23, 2004
DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES
DISTRICT JUDGE

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[2] The Court construes the pro se complaint liberally. *Ahmed v. Rosenblatt,* 118 F.3d 886, 890 (1st Cir. 1997).

[3] The Sixth Circuit affirmed plaintiff's conviction on February 13, 2002, and this case was filed on April 9, 2003, after the one-year statute of limitations for habeas actions had run. 28 U.S.C. § 2255.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JACK C. CHILINGIRIAN

Plaintiff

V.

UNITED STATES OF AMERICA

Defendant

CIVIL ACTION
NO. *03-10703-RWZ*

JUDGMENT

ZOBEL, D. J.

In accordance with the MEMORANDUM OF DECISION entered 1/23/04;

JUDGMENT is entered for DISMISSING the complaint.

1/27/04
Date

By the Court,

s/ Lisa A. Urso
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JACK C. CHILINGIRIAN,

Plaintiff

vs.

CIVIL ACTION NO.
03 10703 RWZ

UNITED STATES OF AMERICA,

Defendant /

COMPLAINT

NOW COMES the above named Plaintiff, JACK C. CHILINGIRIAN, Pro Se and hereby files this action under the Federal Tort Claims Act and in support alleges and avers as follows:

JURISDICTION AND VENUE

1. This action arises under the Federal Tort Claims Act, 28 USC § 2671 thru § 2680.

2. That this Court is vested with Jurisdiction pursuant to 28 USC §1346(b).

3. That venue is appropriate in that the Plaintiff resides in the Town of Brewster, County of Barnstable, State of Massachusetts and that he is presently an incarcerated inmate at the Federal Medical Center, Devens located in Ayer, Massachusetts.

4. That pursuant to 28 USC § 2675, the Plaintiff on June 12, 2002 provided the requisite notice and statement of claim upon which the instant complaint is brought.

5. That on October 22, 2002, the United States Department of Justice thru the Civil Division, Torts Branch Federal Tort Claims Act Staff denied the Plaintiff's timely claim for damages.

6. That this action is commenced timely in that it is brought within the statutory time period after the denial of the claims for damages recited above.

7. That the allegations sounding in Negligence in the instant complaint do not fall within any of the statutory exceptions recited in 28 USC § 2680.

PARTIES

8. The Plaintiff, **JACK C. CHILINGIRIAN**, is a citizen of the United States who resides in Brewster, Massachusetts and was formerly an attorney licensed to practice law in the State of Michigan from 1971 until his disbarment from the practice of law in 2000.

9. That the Defendant, **UNITED STATES OF AMERICA**, employed certain individuals in various agencies including the Department of Justice in its various departments and sections, who acting in their minsiterial and individual capacities during the course of their employment, did conspire to interfere with and violate Plaintiff's constitutional rights and privileges, and did deprive the Plaintiff of his liberty and property without due process of law, all in conflict with the Constitution of the United States and various other federal statutes, as well as the laws of the State of Michigan as more fully and accurately described below.

FACTS

10. Plaintiff, **JACK C. CHILINGIRIAN**, now 60 years old, served his country in the Vietnam War, was honorably discharged with the rank of Captain, was awarded the National Defense Service Medal and the Vietnam Service Medal. He is a graduate of the University of Detroit Law School. He is married to his wife JOANN E. CHILINGIRIAN for 35 years, with two children, both of whom are grown, married and productive members of society.

11. Plaintiff was admitted to the State Bar of Michigan in January of 1971. He practiced law until April 1999. During the course of his law practice Plaintiff came to represent JACK RASHID, CHARLES RASHID, and GEORGE RASHID (collectively the "RASHIDS"), three brothers who thru their companies, VEHICLE RADAR SAFETY SYSTEMS INC and ADVANCED RADAR TECHNOLOGIES INC., sought to develop a radar braking collision warning device.

12. In the summer of 1996, after a decade of representing the RASHIDS and their companies, the U.S. Attorney's Office for the Eastern District of Michigan issued an Information against the RASHIDS alleging that they had conspired to defraud individuals who had invested in their companies.

13. In September of 1996, the U.S. Attorney issued subpoenas upon the Plaintiff demanding that all records, files, papers, and documents in his possession and control be delivered to the Offices of the U.S. Attorney in Detroit, Michigan.

14. That subsequent to the issuance of these subpoenas the Plaintiff was notified by the lawyers representing the RASHIDS and their corporations that the delivery of any such subpoenaed documents would constitute a violation of the attorney-client privilege.

15. That upon receipt and review of the subpoenas that were issued, the Plaintiff delivered ***all*** documents in his possession and control to the office of the U.S. District Judge who had authorized the subpoenas, said documents were delivered in a sealed box and included a statement that Plaintiff had been compelled to take such action to avoid violating the attorney client privilege, as well as being in contempt of any order of the Court.

16. That from September 1996 thru March 1997, the Plaintiff had been advised by the Offices of the U.S. Attorney in Detroit, Michigan that he was not a target of any investigation.

17. However, in March 1997, Plaintiff received a "target" letter and was asked to voluntarily participate in a **KASTIGAR** meeting, which took place at the Offices of the U.S. Attorney in the middle of March 1997.

18. That Plaintiff attended the meeting with his attorney. There were several Assistant U.S. Attorneys in attendance along with several FBI agents involved in the proceedings.

19. That the very first statement from PATRICK CORBETT Asst. U.S. Attorney in charges was: "MR. CHILINGIRIAN, are you prepared to turn over the subpoenaed documents, testify against your clients, despite their asserting the attorney-client privilege, and risk

losing your license in lieu of a grant of immunity from prosecution?"

20. Plaintiff's counsel requested that Plaintiff remove himself from the meeting room, whereupon Plaintiff's counsel admonished Asst. U.S. Attorney CORBETT about making such a demand when he knew or should have known that such a demand violated the rights of the Plaintiff and violated the duties of the Office of the U.S. Attorney.

21. That Plaintiff rejected to turn over the subpoenaed records and testify against his clients and informed the Asst. U.S. Attorneys that he had already delivered to the Court the subpoenaed documents in his possession and control.

22. That subsequent thereto, in April of 1997, U.S. Attorney SAUL GREEN, while employed by the Defendant, and acting in his capacity as U.S. Attorney for the Eastern District of Michigan, did cause the Plaintiff to be prosecuted and stand trial based upon an indictment which on its face, failed to state a federal offense, and that while wrongfully prosecuting the Plaintiff did so without the requisite jurisdiction to do so.

23. Further, SAUL GREEN wrongfully obtained the indictment against Plaintiff without the requisite authority from the Department of Justice Money Laundering Section as was required by the Rules of the Department of Justice.

24. That such actions were taken by the subordinates of SAUL GREEN, namely Asst. U.S. Attorneys PATRICK CORBETT and TERRANCE BERG, who were

responsible for the prosecution of Plaintiff's Criminal Case.

25. That the prosecution against the Plaintiff was vindictive and malicious in that CORBETT and BERG were well aware that the Plaintiff lacked the requisite mens rea required under the money laundering statute and that the prosecution was brought against the Plaintiff because he refused to violate the attorney-client privilege and testify against his Co-Defendants (clients) and turn over to the U.S. Attorney's Office the privileged documents demanded thru subpoena by the Government, notwithstanding the fact that Plaintiff had already under seal delivered such documents to the Court.

26. That nowhere in the indictment filed against the Plaintiff did the Government charge the precise amount of money alleged by the Government to be attributable to the Plaintiff as part of the alleged money laundering scheme charged in the indictment.

27. That the indictment upon which the Plaintiff was charged, tried, convicted and sentenced was on its face constitutionally infirm for failing to state all of the factual elements of the offense of the conspiracy to launder money instruments in violation of the substantive provisions of the applicable statute.

28. That prior to the obtaining of the indictment against the Plaintiff, U.S. Attorney SAUL GREEN and his subordinates PATRICK CORBETT and TERRANCE BERG were aware of the legal authority that had been in existence for over 100 years with respect to the requirements of due process, the Grand Jury Clause and Notice Requirements mandated by the Fifth and Sixth Amendments to the United States Constitution.

29. That subsequent to the entry of the Judgment of Conviction, the U.S. Supreme Court decided the case of ***Apprendi v. New Jersey*, 530 US 466 (2000)**, which held in relevant part that all elements of an offense must be charged in the indictment and proven to the fact finder beyond a reasonable doubt.

30. That in light of ***Apprendi***, the indictment filed against the Plain-tiff failed to state a federal offense and the Government lacked the requisite jurisdiction to try, convict and obtain a sentence of incarceration against the Plaintiff.

31. That the U.S. Attorney, SAUL GREEN and his successor, JEFFREY COLLINS failed to move for vacature of the constitutionally infirm Judgment of Conviction after Plaintiff presented his own process relying upon ***Apprendi***.

32. That at all material times recited herein, SAUL GREEN, as the duly appointed United States Attorney for the Eastern District of Michigan, was acting as an agent of the Defendant UNITED STATES OF AMERICA and acting within his duly appointed scope of employment.

33. That at all times recited herein, JEFFREY G. COLLINS, as the duly appointed successor to SAUL GREEN, as United States Attorney for the Eastern District of Michigan, was acting as an agent for the Defendant UNITED STATES OF AMERICA and acting within his duly appointed scope of employment.

34. That at all material times recited herein, PATRICK CORBETT and TERRANCE BERG, as acting Assistant United States Attorneys, were acting as agents of the Defendant UNITED STATES OF AMERICA and

were acting within their duly appointed scope of employment.

35. That at all material times recited herein, CYNTHIA OBERG and JENNIFER PEREGORD, as acting Assistant United States Attorneys, were acting as agents of the Defendant, UNITED STATES OF AMERICA and were acting within their duly appointed scope of employment.

36. That at all material times recited herein, the named federal employees, named above and others did negligently and wrongfully fail to perform duties as mandated upon them by Court Rules, Federal Statutes, Internal Policies and Regulations adopted by the Department of Justice, Ethics Rules of the State of Michigan, Prosecution Guidelines and the Constitution of the United States.

37. That further, JEFFREY G. COLLINS and his subordinate, JENNIFER PEREGORD, presented to the United States Probation Department certain information relating to alleged relevant conduct which was never charged in ***any*** indictment, all in violation of the United States Constitution and case authority from the United States Supreme Court.

38. That this action was taken at Plaintiff's resentencing hearing on May 23, 2002 and as a result of such action the Plaintiff's sentence was increased by an additional 50 months from the originally imposed sentence of 37 months.

39. That as a result of the presentment of such relevant conduct by the Office of the United States Attorney for the Eastern District of Michigan of the alleged

uncharged and unconvicted conduct of the Plaintiff a sentence was imposed in violation of the Thirteenth Amendment Section 1 of the United States Constitution which states that there shall be no "involuntary servitude except as punishment for crimes whereof the party shall have been ***duly convicted***"

40. That involuntary servitude for unconvicted crimes may not "exist within the United States or any place subject to their jurisdiction" according to the language of the Thirteenth Amendment of the Constitution, and Plaintiff asserts that such actions and conduct of the above named federal employees have caused such involuntary servitude.

41. That the actions of JEFFREY G. COLLINS in concert with JENNIFER PEREGORD have placed the Plaintiff into involuntary servitude, and he will continue in that status until action is taken to correct the errors and wrongful conduct described above.

42. That as a result of the negligent and wrongful actions of the federal employees named above in failing to competently and properly perform and execute their usual and customarily required duties, the Plaintiff was maliciously prosecuted, tried, convicted and sentenced to a term of imprisonment, all without the requisite jurisdiction to do so.

43. That due to the continued negligence or otherwise wrongful acts or omissions of the above named federal employees, the Plaintiff continues to be incarcerated in a federal prison depriving him of his liberty without authority and jurisdiction to do so.

44. That based upon the tortious acts, negligent and wrongful conduct of each of the federal employees named above who are presently or were employees of the Defendant UNITED STATES OF AMERICA, and who individually and in concert were acting within the scope of their employment, and who were and continue to be responsible by their negligent or wrongful conduct for bringing harm and injury to the Plaintiff thereby causing a loss of liberty and freedom and damages for which the Plaintiff is entitled to seek relief.

45. That as a result of the above described unlawful conduct and violations of the Plaintiff's Constitutional rights, the Plaintiff suffers and continues to suffer great financial losses, humiliation, embarrassment, physical and mental suffering, as well as loss of reputation in and among business associates, friends and family.

46. That as a result of the above described unlawful conduct and violations of the Plaintiff's Constitutional rights, the Plaintiff has been sentenced to a term of imprisonment in violation of the Constitution.

47. That all of the above named federal employees are not entitled to immunity for the following reasons:

a. That the actions of said federal employees violated clearly established constitutional rights which a reasonable person would have known and recognized.

b. That the actions of said federal employees was taken with the malicious intent of causing the deprivation of Plaintiff's constitutional rights.

c. That the above named federal employees had no discretion to act as they did since they

violated and ignored and otherwise failed to comply with regulations and policies designed to guide their actions, and that said employees conducted themselves in a manner that no reasonable person would have under like circumstances.

d. That the above named federal employees undertook certain improper and unauthorized actions on their own accord without direction from their supervisors at the Department of Justice, including the obtaining of a criminal indictment against the Plaintiff without processing the mandated submission of a prosecutive memorandum required by the internal regulations of the Department of Justice.

e. That Assistant U.S. Attorney's PATRICK CORBETT and TERRANCE BERG acted in an investigative capacity during the course of their investigation of the Plaintiff and were well aware of exculpatory materials which established the Plaintiff's lack of knowledge and intent with respect to the criminal charges that were ultimately brought, and by their conduct in seeking to intimidate Plaintiff in testifying against his clients lost their objectivity and violated their duty to fairly uphold the laws of the United States and further violated the Ethics Rules of the State Bar of Michigan.

f. That Assistant U.S. Attorney CORBETT acted in a non-advacatory role during the investigation of the Plaintiff, especially when he attempted to coerce the Plaintiff into violating the attorney-client privilege by seeking his cooperation and testimony against Plaintiff's clients for a grant of immunity from prosecution.

FIRST CAUSE OF ACTION

48. That by the above recited negligence and wrongful conduct of the named federal employees the Plaintiff was deprived of his right to due process and to an informed and impartial Grand Jury as guaranteed by the Fifth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

49. That the above recited actions of the federal employees constituted false arrest and abuse of process and malicious prosecution,-all in violation of the laws of the State of Michigan, which this Court may adjudicate as pendant to the other recited Causes of Action.

THIRD CAUSE OF ACTION

50. That the above recited improper and malicious acts of the above named federal employees deprived the Plaintiff of his property without due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

FOURTH CAUSE OF ACTION

51. That the above recited unlawful conduct of the named federal employees resulted in a violation of Plaintiff's constitutional rights wherein he was incarcerated in violation of the thirteenth Amendment of the United States Constitution.

FIFTH CAUSE OF ACTION

52. That the above recited unlawful conduct and malicious activities of the above named federal employees was accomplished to punish the Plaintiff for his reliance upon the right to file an appeal of his criminal conviction and additional rights under the United States Constitution.

DAMAGES

53. That as a direct and proximate result of the negligence of those named U.S. Attorney's, Assistant U.S. Attorney's and others employed by the Defendant, UNITED STATES OF AMERICA, the Plaintiff has suffered damages in the amount of $20,000,000.00 (TWENTY MILLION DOLLARS) as recited in the Notice of Claim previously submitted as described in paragraph 4 above.

54. That in order to deter the Defendant and those employed by the UNITED STATES OF AMERICA from engaging in such unlawful and unconstitutional activities, the Plaintiff requests punitive damages plus costs and fees and any other further relief as the Court deems just and equitable.

WHEREFORE, Plaintiff respectfully requests that a Judgment in the amount of $20,000,000.00 (TWENTY MILLION DOLLARS) be entered against the Defendant and in his favor.

DATED: APRIL 7, 2003

RESPECTFULLY SUBMITTED,

/s/ Jack C. Chilingirian

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